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No. 87-1287

In the Supreme Court of the United States

OCTOBER TERM, 1987

CLIFTON J. HUMPHRIES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor
for Special Appellate
and Supreme Court Litigation

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether a maritime employee who was injured in an automobile accident that took place in front of a restaurant, located in the waterfront area, to which he had been sent in the course of his employment, was injured on a "situs" covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B16) is reported at 834 F.2d 372. The opinion of the Benefits Review Board (Pet. App. C1-C17) is reported at 19 Ben. Rev. Bd. Serv. (MB) 187. The decision of the administrative law judge (Pet. App. D1-D38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1987. A petition for rehearing was denied on October 30, 1987 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on January 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed as a ship foreman by respondent Cargill, Inc. at its grain loading facility on the Elizabeth River in Chesapeake, Virginia. On December 23, 1974, petitioner was working at Cargill's terminal, supervising loading operations on the second shift, which runs from 3:30 p.m. to midnight. Petitioner's duties included picking up food for employees working overtime, so that there would be no interruption in their work. Pet. App. B3. Petitioner left the Cargill terminal in his car at approximately 10 p.m. to pick up a meal at a restaurant about one and one-half miles away, on Bainbridge Boulevard, a major road in the waterfront area of Chesapeake (*id.* at B3-B4). The restaurant was located "along a public highway on which various maritime employers maintained terminal facilities. The restaurant itself was several hundred yards from the Elizabeth River." *Id.* at B13. Petitioner parked in front of the restaurant. After emerging, he encountered trouble with his car. Petitioner got out to look under the hood and, while he was doing so, another automobile struck petitioner's car. Petitioner suffered severe spinal cord and head injuries, leaving him permanently and totally disabled. *Id.* at B4.

2. Petitioner filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* (Pet. App. B4).[1] An in-

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[1] The LHWCA was amended in 1984 by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, and retitled the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* Individuals like petitioner, who sustained injuries before September 29, 1984, are covered by the LHWCA as it stood before the 1984 amendments. See § 28(c), 98 Stat 1655. Accordingly, we refer throughout

dividual is eligible for benefits under the LHWCA if he satisfies two requirements: the "status" test and the "situs" test. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-265 (1977). Under the status test, LHWCA coverage applies (with certain specific exceptions) to any "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker" (33 U.S.C. 902(3)). The situs test requires that the injury occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)" (33 U.S.C. 903(a)).

When petitioner filed for LHWCA benefits, his employer, Cargill, and its insurance carrier, respondent Commercial Union Insurance Company, contested the claim. After a hearing, an administrative law judge (ALJ) of the Department of Labor found that petitioner satisfied both the status and situs tests (Pet. App. D8-D17).[2] The

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this brief to the LHWCA as it stood before the 1984 amendments. Although the 1984 amendments changed both of the provisions involved in this case (see §§ 2, 3, 98 Stat. 1639-1641), those changes are not relevant to the issues in this case.

[2] Petitioner was injured on December 23, 1974 and did not file for LHWCA benefits until April 6, 1984 (see Pet. App. D6-D7). The LHWCA provides that claims must be filed within one year of the injury (33 U.S.C. 913(a)). It also provides, however, that if the employer has knowledge of the injury it must file a report with the Secretary of Labor, and that the period within which the employee must file his claim is tolled until the employer files its report (33 U.S.C. 930(f)). The ALJ found that Cargill, although it learned of petitioner's injury the day it occurred, did not file a report with the Secretary until September 24, 1984 (Pet. App. D8). Accordingly, the ALJ concluded that petitioner's claim was timely (*ibid.*).

ALJ held that petitioner met the status test because his duties as shift foreman involved supervising the loading and unloading of cargo on vessels moored at his employer's facility (Pet. App. D9), and petitioner had gone to the restaurant pursuant to those duties (*id.* at D10-D11, citing *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978) (maritime status depends on general employment duties, not the particular task employee was performing when injured)).[3]

The ALJ also held that petitioner was injured on a maritime situs (Pet. App. D11-D12). In reaching this conclusion, the ALJ relied principally on the nature of the area in which the restaurant was located. He noted that the injury occurred three-tenths to four-tenths of a mile from the river (*id.* at D15) in an "industrial area associated with maritime activities and the waterfront" (*id.* at D14 (citation omitted)).

The Benefits Review Board reversed the ALJ's award (Pet. App. C1-C17). The Board found that petitioner was not injured on a maritime situs. It explained that "[a]t the time of his injury, [petitioner] was not exposed to the hazards uniquely inherent in the shipyard industry. Instead, [petitioner] was injured on a public street in front of a restaurant in an area where maritime industry co-exists with other non-maritime activities including businesses and residential neighborhoods." *Id.* at C15-C16. The Board was unwilling to treat as a maritime situs an area which was "not primarily used for or particularly suited to maritime commerce" (*id.* at C16).

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[3] This status determination was not seriously contested by Cargill at any stage of the litigation and is not at issue in this Court (see Pet. App. B7-B8).

3. The court of appeals affirmed the Board's decision.[4] It agreed that petitioner satisfied the status test (Pet. App. B7-B8) and found that the "difficult question" was whether petitioner "was injured in an 'adjoining area customarily used by an employer in loading . . . a vessel' " (*id.* at B8, quoting 33 U.S.C. 903(a)). The court of appeals explained that although "[i]t is generally settled that a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation * * * [there is] no single convincing test for determining just where the geographical boundaries of coverage under the LHWCA lie" (*id.* at B8-B9 (citation omitted)).

After canvassing the precedents[5] and summarizing the ALJ's factual findings, the court of appeals, "[w]ithout venturing to offer a touchstone for all future LHWCA

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[4] The federal respondent, although a party to the appeal, did not file a brief in the court of appeals.

[5] The court of appeals drew on the two cases that have discussed the situs requirement in the most detail, *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981), and *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978), and also briefly discussed a prior decision of its own, *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978). It specifically rejected (Pet. App. B9-B10) petitioner's suggested reliance on *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F.2d 629, 636-639 (3d Cir. 1976), which held that the situs requirement is satisfied whenever the status requirement is satisfied. The court of appeals found the Third Circuit's approach to be inconsistent with this Court's cases, which it interpreted as holding that "*both* the status and situs requirements of the Act must be met independently" (Pet. App. B10, citing *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 426-427 (1985); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977) (emphasis in original)).

jurisdictional questions [concluded] that these findings by the ALJ do not demonstrate that [petitioner] was injured on a maritime situs" (Pet. App. B14). The court explained that the accident occurred "well over a mile from the Cargill terminal, along a public highway which did not connect any portions of Cargill's operations or traverse continuous or contiguous terminal areas," and that the "restaurant itself, while arguably located in a 'waterfront area,' was separated from the Elizabeth River and the nearest maritime terminal by a residential neighborhood" (*ibid.*). On that basis, the court found that the Benefits Review Board was correct in holding that petitioner was not injured on a maritime situs (*id.* at B15).

ARGUMENT

The court of appeals correctly concluded that the determination of maritime situs under Section 903(a) requires a case-by-case analysis of varying fact patterns. While it is debatable whether the court of appeals reached the correct conclusion on the basis of the facts in this case, its result is plausible and does not conflict with any decision of this Court or any other court of appeals. Although it might at some point be useful for this Court to consider the "other adjoining area" element of the situs requirement, the issue has received relatively little treatment in the courts of appeals and the peculiar facts of this case militate against the consideration of that question in this context. Accordingly, further review is not warranted.

1. The court of appeals held that petitioner was not injured within an "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" (see 33 U.S.C. 903(a)). The court of appeals stated that "[t]he LHWCA requires us to draw a spacial line for coverage under the Act" (Pet. App. B15), and

found that the restaurant was in a mixed-use area on the non-maritime side of that line, relying on its distance from the river and the Cargill terminal as well as its separation from the river by a residential neighborhood.[6]

According to the court of appeals, Section 903(a) requires case-by-case line drawing, because there is "no single convincing test for determining just where the geographical boundaries of coverage under the LHWCA lie" (Pet. App. B9). That approach was correct. The statutory definition does not prescribe in any detail how to determine the borders of "other adjoining area[s]," and petitioner does not suggest any particular formula for doing so.[7] On the facts as it understood them, the court of appeals concluded that the mixed-use locale in which the restaurant was located was beyond the maritime situs. While the court's weighing of the relevant factual considerations can reasonably be disputed, neither its reasoning nor its conclusion justifies further review.

This Court has considered the situs test only once, in *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249

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[6] Petitioner maintains (Pet. 33) that the court of appeals' account of the facts was incorrect, and in particular that the residential neighborhood in question was landward of the restaurant, not between it and the river. Even if that is correct, a factual error by the court of appeals would not be grounds for review by this Court.

[7] The court of appeals appears to have held that the restaurant was on the landward side of the line dividing maritime from non-maritime areas (see Pet. App. B13 (ALJ properly considered "the character of the area in which the accident occurred")). For that reason, the court of appeals did not have to consider whether the situs test requires that the specific place at which the injury occurs, as opposed to the broader area within which that place is located, needs to be "customarily used by an employer" for maritime purposes (see 33 U.S.C. 903(a)). See *Texports Stevedore Co.* v. *Winchester,* 632 F.2d at 516 (rejecting suggestion that situs test turns on "the precise place where the injury occurred rather than the broader area").

(1977). *Caputo* dealt, not with the statutory category at issue in this case—"other adjoining area"—but with an injury that took place in a terminal, one of the sites specifically listed in Section 903(a). It held that the entire terminal was a maritime situs, although only one of its two piers was actually used for loading and unloading vessels (432 U.S. at 280-281). The approach and outcome in this case are entirely consistent with *Caputo*.[8]

2. a. The decision in this case does not conflict with that of any other court of appeals. Petitioner suggests (Pet. 18-20) that the decision below is inconsistent with *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F.2d 629 (3d Cir. 1976). In *Sea-Land*, the Third Circuit in effect eliminated the situs test as an independent requirement, holding that if a worker meets the status test his location at the time of the injury is irrelevant (see 540 F.2d at 636-639). As the court of appeals in this case recognized (Pet. App. B9-B10), however, that approach did not survive this Court's decision in *Caputo*, which expressly held that an individual is covered only if he meets both the situs and status tests (see 432 U.S. at 264-265).

The two court of appeals opinions that have discussed the "other adjoining area" component of the situs requirement in some detail are both consistent with the approach taken below. In *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (1980) (en banc), cert. denied, 452 U.S. 905 (1981), the Fifth Circuit considered the application of the situs test to a "gear room," located five blocks from the gates of the dock, that was used to maintain and repair stevedoring equipment (632 F.2d at 506-507). The Fifth Circuit held that the gear room was within an "other adjoining area" covered by the Act, noting that there was

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[8] Contrary to petitioner's suggestion (Pet. 17), *Caputo* did not deemphasize the situs requirement. It simply held that in that case the situs requirement was easily met.

no need for absolute contiguity of maritime structures between a covered area and the water (*id.* at 514). The court of appeals in that case declined to set forth a general rule, finding instead that "[t]he best way to effectuate the congressional purposes is to determine the situs question by looking at all the circumstances" (*id.* at 513).

The Ninth Circuit has also addressed this issue, in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978) (Kennedy, J.). The injury in *Brady-Hamilton* occurred in a gear locker, used to store and repair stevedoring equipment, that was located outside of the port proper, 2,600 feet from the river's edge (568 F.2d at 139). Like *Texports*, *Brady-Hamilton* found that an area need not be contiguous with the water in order to be a maritime situs (*id.* at 140-141). Instead, the Ninth Circuit, admitting that the test is not precise (*id.* at 140), found that "the phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend upon physical contiguity" (*id.* at 141). The court then suggested the following factors, among others: "the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case" (*ibid.*).[9]

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[9] The First Circuit has also applied the "other adjoining area" aspect of the situs test, although without venturing to discuss it in much detail, in *Prolerized New England Co.* v. *Benefits Review Board*, 637 F.2d 30, 38-39 (1980), cert. denied, 452 U.S. 938 (1981). Relying on the construction of "terminal" adopted by this Court in *Caputo*, the First Circuit held that an "injury in an adjoining area used for both loading and manufacturing met the situs requirement" (637 F.2d at 39).

Thus, the opinions in this case, *Texports,* and *Brady-Hamilton* all recognize that determining whether a site is within an "other adjoining area" involves a fact-specific inquiry that considers geography and maritime function but does not rest on any one factor. All the courts have rejected a requirement of absolute contiguity with the water, but none has adopted a firm test. Although the Ninth Circuit listed certain considerations that may be relevant, it understood that others might also have some bearing on the decision (*Brady-Hamilton*, 568 F.2d at 141). No court of appeals has adopted a rule that would require a different outcome in this case.[10]

b. The lower courts have generally found that the "other adjoining area" aspect of the situs test involves, not a difficult legal question, but the difficult application of an inherently uncertain legal standard to varying fact patterns (see, *e.g.*, Pet. App. B7 (statute creates "intractable jurisdictional problems")). Thus, if this Court ever decides that it would be useful to address the issue, it would benefit greatly from additional decisions in the lower courts, so that the application of the test could be understood in a variety of contexts. Of course, the Court may find that the statutory standard admits of no significant clarification. Cf. *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 426 (1985) ("there will always be a boundary to coverage, and there will always be people who cross it during their employment" (citation omitted)).

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[10] Petitioner also discusses (Pet. 23-24) *Perkins* v. *Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982) and *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977). In *Perkins*, the situs issue was not contested before the ALJ and the court of appeals did not reach it on the merits. *Stockman* involved, not an "other adjoining area," but a terminal.

Moreover, this case is not well suited to be a vehicle for consideration of this question. For one thing, the facts appear to be in dispute (see Pet. 33 (alleging errors by court of appeals)), and they are not developed in great detail in the court of appeals' opinion. It would be difficult, then, to develop a fact-sensitive standard of the sort clearly required by Section 903(a). In addition, in this case the actual site of the injury – the restaurant – was only indirectly connected to the shipping industry (compare *Texports*, 632 F.2d at 516 (suggesting that stevedore company's own office building was a covered situs although not used for loading or unloading)). While the court of appeals did not rely on this fact, it introduces a consideration that does not appear to be typical of cases involving "other adjoining area[s]." For that reason, a decision in this case might be of relatively little general applicability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor
for Special Appellate
and Supreme Court Litigation

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney
Department of Labor

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